92-1946

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

WARD PETROLEUM CORPORATION, et al.,

Petitioners,

vs.

THE OKLAHOMA CORPORATION COMMISSION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA, DIVISION III

PETITION FOR WRIT OF CERTIORARI

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June, 1993

QUESTIONS PRESENTED

I. Because of an intervening change in the law, were Petitioners' rights to due process of law violated by the application of the doctrines of res judicata and collateral estoppel?

II. Did the Oklahoma Corporation Commission's misleading and erroneous notice given to Petitioners, who were respondents to a pooling order, result in taking Petitioners' property without due process of law?

LIST OF PARTIES

Petitioners are Ward Petroleum Corporation, Verlan W. Harrell, Whitbar Energy Limited Partnership, T. Michael Cocheres, Gilbert Tompson, Norman R. Gelphman, Larry E. Boyd, James Kuhlman, David M. Pulling, Thomas G. Wygant, and Viersen Oil and Gas Company. Respondents are The Oklahoma Corporation Commission, The Louisiana Land & Exploration Co., MacFarlane Company, and Trimble Properties. All parties before the Oklahoma appellate courts are before this Court, with the exception of Nova Energy Corp., whose rights have been transferred to Petitioner Verlan W. Harrell.

Corporate Petitioner Ward Petroleum Corporation has no parent corporation and has no corporate subsidiaries which are not wholly-owned.

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OPINIONS BELOW

The Opinions and Orders below were not officially published. The Oklahoma Court of Appeals, Division III, issued its Opinion on October 13, 1992. APP. 4.[1] The Oklahoma Supreme Court denied Petitioners a writ of certiorari on March 2, 1993. APP. 1. Mandate was issued in this case by the Oklahoma Supreme Court on March 12, 1993 and was published at 64 Okla.B.J. 842 (1993).

[1] The Appendix to this Petition is cited as "APP. __."

JURISDICTIONAL GROUNDS

The Oklahoma Court of Appeals, Division III, entered its decision on October 13, 1992. The Supreme Court of the State of Oklahoma entered its order denying discretionary review of said decision on March 2, 1993. This Court has jurisdiction to review the decision of the Oklahoma Court of Appeals, Division III, as the highest court of the state in which review could be had, pursuant to 28 U.S.C. § 1257 (Supp. 1993).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional provisions, statutes and regulations, which are fully reprinted in the Appendix: U.S. Const. amend. XIV, § 1; Okla. Stat. tit. 52, § 87.1(e) (West Supp. 1993); Oklahoma Corporation Commission Policy Statement No. 45 (May 3, 1984).

STATEMENT OF THE CASE

The Questions Presented arise out of proceedings brought under Oklahoma's "forced pooling" statute, Okla. Stat. tit. 52, § 87.1(e). APP-81. Oklahoma's forced pooling statute was enacted in order to insure that this State's valuable natural resources could be developed, even if all owners of the right to drill therefor do not consent to such development.

Under the statute, an owner of rights

within a drilling and spacing unit - a common source of supply (geological formation) covering a specified surface area established by order of the Oklahoma Corporation Commission ("Commission") - may apply to the Commission for an order authorizing the applicant or some other party to drill a well on the unit, establishing the estimated costs thereof, and providing a respondent with certain options which he may exercise in order to "recover or receive without unnecessary expense his just and fair share of the oil and gas." Okla. Stat. tit. 52, § 87.1(e). Traditionally, Commission forced pooling orders are "three-way orders", i.e. they provide three alternative options for the respondents to elect. In the instant case, any respondent to Pooling Order No. 260474 had the option, within a certain

time, to elect whether he would participate in the costs of development, or whether he would accept a bonus payment plus a small overriding royalty interest as compensation in lieu of participation, or whether he would accept a larger overriding royalty interest as compensation in lieu of participation. APP. 71-75.

Beginning at least in September of 1983 and continuing until early May of 1984, there was controversy at the Commission and among oil and gas industry members regarding the scope of forced pooling orders: Would any election in lieu of participation cause the respondent to relinquish the right to participate only in the first well drilled in the drilling and spacing unit, or would such an election cause the respondent to

relinquish the right to participate in any well drilled in the drilling and spacing unit? In other words, did the forced pooling order pool the initial wellbore or the entire drilling and spacing unit? R. at 337.[2]

Prior to May 3, 1984, the Commission had entered some orders which it intended to have unitwide scope and some orders which it intended to have wellbore scope. Some of those orders had been appealed to the Oklahoma Supreme Court, who had not previously ruled on the scope of forced pooling orders, and the Commission legal staff was having great difficulty in reconciling the Commission's position in those appeals. R. at 340. In addition, the Commission felt that the industry as

[2] References to the record before the Oklahoma appellate courts are cited here at "R. at ___".

a whole was entitled to expect uniformity in the Commission's forced pooling orders and was entitled to a statement by the Commission of its interpretation of law on this issue. R. at 345.

In order to meet these problems, the Commission issued, on May 3, 1984, its Statement of Policy No. 45 wherein the Commission stated unequivocally that "The policy of this Commission is to pool, without exception, by the wellbore . . .". APP. 55.

On September 20, 1983, Inexco Oil Company ("Inexco") filed an application in Cause CD No. 108567 to force pool Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma ("Section 23"). APP. 20. The amended notice regarding hearing of that application stated:

> STATE OF OKLAHOMA TO: A l l Persons, Owners, Producers,

Operators, Purchasers and Takers of oil and gas, and all other interested persons particularly in Custer County, Oklahoma; and more particularly to Glen P. Albright and Alma H. Albright; James E. Kuhlman c/o Thomas G. Wygant; and, if any of the above named are deceased, the unknown heirs, executors, administrators, devisees and assigns, immediate and remote, of the above named persons; and, if any of the above named companies are no longer in existence, the unknown successors or trustees of the above named companies.

NOTICE IS HEREBY GIVEN that Applicant in this Cause is requesting that the Commission pool and adjudicate the rights and equities of oil and gas owners pursuant to Title 52, Section 87.1 O.S., in the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

IT IS ORDERED that this Cause be referred to a Trial Examiner for hearing, taking of evidence and reporting his findings and recommendations to the Commission.

> IT IS ORDERED AND NOTICE IS HEREBY GIVEN that this Cause will be heard before a Trial Examiner at the Corporation Commission, 3rd Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at 9:00 a.m. on the 17th day of October, 1983, and that this Notice and Order be published as required by law and the rules of the Commission.
>
> NOTICE IS FURTHER GIVEN that all interested persons may appear and be heard. For information concerning this action, contact Alice S. Mitchell, Attorney for Applicant, The Energy Plaza, 3030 N.W. Expressway, Suite 1000, Oklahoma City, Oklahoma 73112, 405-943-0132.

R. at 831; Exhibit 45.

The application was heard on April 20, 1984, at which time Inexco, Ward Petroleum Corporation ("WPC") and Viersen Oil and Gas Company ("Viersen")[3] appeared. At the time of the hearing,

[3] Incorrectly identified as Viersen & Cochran in the transcript of proceedings.

Viersen owned an unleased mineral interest and WPC owned a leasehold interest in Section 23. APP. 21-22.

On May 3, 1984, the Commission issued its Statement of Policy No. 45, which was its third notice in Cause CD No. 108567.[4] Such notice was published by mailing to members of the bar and oil and gas industry, as well as by placing copies of same on a public notice table in the hall on the third floor of the Jim Thorpe Building. R. at 342. Inexco actually received a copy of that policy statement, (r. at 598), as did Inexco's counsel. R. at 499-502. Further, Petitioners each actually received and read a copy of that policy statement. R. at 121; 267; 277;

[4] Prior to the issuance of the Amended Notice and Order Referring and Setting Cause for Hearing quoted above, the Commission issued a Notice and Order Referring and Setting Cause for Hearing. See R. at 831; Exhibit 45.

295; 313-314; 432; and 522.

Thereafter, the Commission issued its Order No. 260474 in Cause CD No. 10867 on June 6, 1984. APP. 62. Petitioners, or their predecessors in interest, elected not to participate with their full interests in the initial well covered by Order No. 260474, opting instead for alternatives provided in the Order. APP. 23. Such elections were the result of: (1) Petitioners' opinion that the location chosen by Inexco for the initial well would be marginal, at best; (2) the Commission's notice of the effect of pooling, as set forth in the policy statement, stated that parties were only relinquishing wellbore rights if they elected not to participate; (3) the terms of Order No. 260474 did not expressly state that an election other than to

participate would result in a relinquishment of unitwide rights; and (4) Inexco did not advise any of the respondents to Order No. 260474, prior to the time that elections were due, that an election not to participate would, in Inexco's opinion, result in a transfer to Inexco of unitwide rights. R. at 85; 113; 114; 125; 126; 198; 208; 280; 282; 284; 286; 291; 295; 296; 298; 302; 311; 313-314; 428-429; 430-431; 432; and 434.

Inexco thereafter drilled a well in Section 23 and completed same in the Des Moines common source of supply (the "Wolfe well"). APP. 23.

In December of 1984, WPC proposed the drilling of an additional well in Section 23 because the Wolfe well was only a marginal producer and could not recover all hydrocarbons from under the 640-acre

drilling and spacing unit. R. at 844; Exhibit 58. WPC obtained orders from the Commission allowing the drilling of an increased density well at an off-pattern location. R. at 844 and 845; Exhibits 59 and 60. In addition, WPC sought another pooling order of the Commission, allowing it and other respondents to Order No. 260474 an election to participate in the increased density well. Order No. 277146 was entered by the Commission pursuant to that application, and WPC thereafter drilled the Albright Farms well in Section 23, which well is a prolific producer of oil and gas.

Order No. 277146 was reversed on appeal in *Inexco Oil Co. v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied* 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989). In *Inexco*,

the Oklahoma Supreme Court determined that the Commission had exceeded its jurisdiction when it entered a second order purporting to pool interests in Section 23, and thus, that none of the Petitioners had the right to participate in production from the Albright Farms well to the extent that they had elected not to participate under the original Pooling Order No. 260474.[5]

After this Court denied certiorari in *Inexco*, Petitioners filed their application in Cause CD No. 149617,

[5] The Supreme Court's decision in *Inexco* was based upon the previous decision in *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203 (Okla. 1988) which was the first opinion to reach the precise question of the scope of Commission forced pooling orders. In its modification of the Court of Appeals' opinion in *Amoco*, the Supreme Court stated that the unitwide effect of elections not to participate under pooling orders had not "been clearly foreshadowed" by previous opinions of the Court. 751 P.2d at 208.

seeking an order of the Commission vacating Order No. 260474 or, in the alternative, modifying Order No. 260474 to allow new, properly informed elections to be made thereunder. R. at 786; Exhibit 1. The primary grounds for vacation of Order No. 260474 was the misleading notice given by the Commission regarding the effect of elections not to participate under that Order: Petitioners' rights to due process of law were violated by the erroneous and misleading notice given by the Commission. *Id.*

By Order No. 358995 issued on July 31, 1991, the Commission denied the requested relief. APP. 11. In adopting the decision of the Administrative Law Judge who originally heard Petitioners' application, the Commission found Petitioners' due process argument

unavailing. APP. 51-52. In so ruling, the Commission determined that Petitioners' application here was barred by the doctrines of res judicata and collateral estoppel arising from the litigation leading to the opinion in *Inexco*. APP. 49-50. The Commission also found that Petitioners had no right to rely on Statement of Policy No. 45, nor upon the language of Order No. 260474 which referred only to the "well". APP. 50-51. The Commission found that Petitioners were not denied due process because "Order No. 260474 was entered based upon proper application and notice. No party was denied an opportunity to appeal and voice their view as to the scope of pooling orders. The Applicants (Petitioners), or their predecessors, chose not to raise such issue prior to

issuance of the Order." APP. 52.

Petitioners timely appealed Order No. 358995 to the Oklahoma Supreme Court, who assigned the case to the Court of Appeals, Division III, for decision.

The Court of Appeals, Division III, issued its decision on October 13, 1992, summarily affirming Order No. 358995 of the Commission. APP. 4.

The Oklahoma Supreme Court denied Petitioners' request for discretionary review of the Court of Appeals' decision on March 2, 1993. APP. 1.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case because the highest court of the State of Oklahoma in which review could be had has decided two federal questions in a way in conflict with applicable decisions of this Court. In so deciding

this case, the state court has allowed the Petitioners to be deprived of property interests worth millions of dollars on the basis of another case in which Petitioners were not provided a full and fair opportunity to present their constitutional arguments. The state court has also allowed Petitioners to be deprived of property based upon notice which is indisputably incorrect and misleading. This Court should grant certiorari to safeguard the basic constitutional principle of "fundamental fairness" and to announce clearly for all courts below that "fundamental fairness" is not served by blind application of the doctrines of res judicata and collateral estoppel, nor by notice which is incorrect and misleading.

In *Hansberry v. Lee*, 311 U.S. 32

(1950), this Court stated:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indemnity Co. v. Rupp, 235 U.S. 261, 273, 35 S.Ct. 37, 40, 59 L.Ed. 220.

311 U.S. at 40.

In the instant case, Petitioners rights were adjudicated in Order No. 358995 on the basis of res judicata and collateral estoppel, allegedly arising out

of the decision in *Inexco*. However, the doctrines of res judicata and collateral estoppel should not have been applied, and their application resulted in a denial of due process to Petitioners.

The Commission found in Order No. 358995 that the doctrines of res judicata and collateral estoppel apply to bar the relief requested by Petitioners. The only support for this finding is Exhibit 85, which contains the **appellate** filings in *Inexco*. However, these filings are completely inconclusive on the issue of whether Petitioners were afforded a proper opportunity to be heard on their due process claim, which is the basis for Petitioners' application seeking to vacate Order No. 260474 on the basis of misleading and erroneous notice.

Even assuming that such doctrines can

be applied in this case, there is a long-standing exception to their application in cases involving constitutional issues where new legal conditions intervene between the first proceeding and the second. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-602 (1948). In such cases, the operation of preclusion doctrines results in unequal treatment of similarly situated individuals, some of whom have had the misfortune to have sought legal redress at an earlier phase of legal development. *Id.*

In the instant case, Petitioner's constitutional rights to due process are involved. There can be no dispute that, between the time that the Commission tried the application leading to the decision in *Inexco* and the application filed below, the Oklahoma Supreme Court finally spoke

regarding its interpretation of the scope of pooling orders. *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203 (Okla. 1988). The Oklahoma Supreme Court recognized that the result of *Amoco* had not been clearly foreshadowed by prior decisions. 752 P.2d at 208. There can be no question that the legal climate regarding the issue of what rights are transferred by an election not to participate under a pooling order changed dramatically after *Amoco* was issued.

Under these circumstances, the rule of *Sunnen* has validity. It was a denial of due process of law for Commission and for the Court of Appeals to deny Petitioners' request on the basis of the preclusion doctrines.

When acting in its adjudicative capacity, the Commission is subject to due

process requirements similar to those imposed upon judicial bodies. *Mullins v. Ward*, 712 P.2d 55, 60 (Okla. 1985). Minimum standards of federal and state due process thus govern pooling proceedings. *Id.* When the Commission enters an order which materially affects the rights of a party without notice, such order is facially void. *Id.*

Almost without exception, for cases involving the sufficiency of notice under due process standards, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) provides the cornerstone:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> * * *
>
> An elementary and fundamental requirement of due process in any proceeding which is to be

> accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such a nature as reasonably to convey the required information.
>
> * * *
>
> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 314-315 (citations omitted).

The federal courts have universally held that notice issued by an administrative agency satisfies due process, unless the recipient can demonstrate that he or she was misled. *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1546 (7th Cir. 1989), *cert. denied* 493 U.S. 1044 (1990); *Cosby v. Ward*, 843 F.2d 967, 983 (7th Cir. 1988); *Savina Home Industries*,

Inc. v. Secretary of Labor, 594 F.2d 1358, 1365 (10th Cir. 1979); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied* 409 U.S. 842 (1972); *L.G. Balfour Co. v. Federal Trade Commission*, 442 F.2d 1, 19 (7th Cir. 1971); *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied* 347 U.S. 1016 (1954); *Mayhew v. Cohen*, 604 F.Supp. 850, 857 (E.D.Pa. 1984).

"The due process clause prohibits unintelligible, confusing, or misleading notices, or any notices which do not meaningfully inform . . . ." *Doston v. Duffy*, 732 F.Supp. 857, 872-73 (N.D.Ill. 1988).

Under the undisputed facts of this case, Petitioners were misled, both by the Commission's Policy Statement and by the

language contained in Order No. 260474 itself. Petitioners wanted to participate in the development of Section 23. Petitioners were willing to take the risk of developing Section 23. Petitioners would not have elected out of such development had it not been for the Commission's Policy Statement and the language of Order No. 260474. Petitioners presented evidence that they would not have made the election that they did had the Commission not entered its Policy Statement or had the Commission not used the language it did in Order No. 260474.

In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), this Court reversed a decision of the Texas appellate courts denying Peralta's request to set aside a judgment for lack of notice:

> As we observed in *Armstrong v. Manzo*, 380 U.S., at 552, 85

> S.Ct. at 1191, only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place." The Due Process Clause demands no less in this case.

485 U.S. at 87.

Worse than the failure to give any notice, as occurred in *Peralta*, is the Commission's express and unequivocal, **but erroneous,** conclusion in its Policy Statement that an election not to participate would **not** result in a relinquishment of unitwide rights. While Petitioners, and everyone else in the State of Oklahoma, were ignorant of the true legal effect of elections not to participate under forced pooling orders, such ignorance was not only **not corrected** by the Commission, but was **in fact fostered** by the Commission's own statement of policy and interpretation of the law.

It must be remembered that the state Supreme Court has expressly found that the unitwide effect of elections not to participate under pooling orders, as first set forth in *Amoco*, had not "been clearly foreshadowed". 751 P.2d at 208. Thus, as of the time that elections were required under Order No. 260474, **everyone** was laboring under the same ignorance of the law.

In *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), this Court held that termination notices sent by the public utility did not comport with Due Process because the notices did not inform customers of the availability of an procedure to present objections to the bills. 436 U.S. at 14-15. If a failure to tell customers of the availability of a procedure to present objections is a

violation of due process, it should be axiomatic that an affirmative misstatement of the effect of an election under a forced pooling order constitutes a violation of due process.

Petitioners were forced to enter into a contract with another private party -- Inexco -- by their elections under Order No. 260474. They could not postpone such action awaiting adjudication of the matter by the state Supreme Court. In order to provide uniformity to persons making such contracts, the Commission gratuitously gave notice to the entire industry, including Petitioners, that any election under Order No. 260474 would affect only rights in the wellbore of the initial well. While the Commission was absolutely incorrect in its conclusion in its policy statement, the fact remains that it issued

such policy statement because it "believes that it is important to the continuing vitality of the industry, especially with regard to increased drilling investment, to rely on this Commission's expertise and oversight capacity in adopting and stating categorically a uniform policy on which all elements of the industry can rely." APP. 57. The fact that the Commission was dead wrong in issuing its policy statement only enhances Petitioner's due process argument, because the very issuance of such policy statement resulted in lulling Petitioners into not protecting their legal rights by appeal of Order No. 260474 or otherwise.

Although both Inexco and its counsel had received a copy of the Commission's policy statement before Order No. 260474 was entered and Petitioner's elections

were made thereunder, Inexco took no steps to ensure that Petitioners knew that Inexco was taking a position contrary to the Commission's stated policy of wellbore poolings. Inexco simply remained mute: it did not inform Petitioners either before the election period ran or before Petitioner's time to appeal Order No. 260474 expired, that Inexco considered a non-participation election to transfer unitwide rights. Inexco did not appeal Order No. 260474 itself, although it knew that the Commission had given notice that elections under Order No. 260474 would have only wellbore effect; it did not contest the issuance of the Commission's Policy Statement in any manner. Instead, Inexco waited until WPC proposed to drill a well at the very location preferred by Petitioners all along. When that well was

proposed, six months had elapsed since Petitioners had made their elections. In other words, Inexco lay behind the log until it was too late for Petitioners to protect their rights by direct appeal. The state courts, by affirming the Order of the Commission, have allowed such parties to benefit from their own failure to correctly and promptly notify Petitioners of their position, and in so doing have acquiesced in a deprivation of Petitioners' rights without due process of law.

CONCLUSION

Petitioners' rights to fundamental fairness and due process were violated when the Commission entered Order No. 260474 containing the words "the well", "a well", and "said well" after it had issued its unequivocal statement that "[t]he

policy of this Commission is to pool, without exception, by the wellbore ...".

The ultimate question involved in here is one of procedural due process and fundamental fairness: Does inadequate notice of the effect of an election under a pooling order result in denial of due process of law which will allow the Commission to vacate or modify a prior pooling order? Petitioners ask this Court to answer such question in the affirmative, and reverse and remand this proceeding with instructions to afford Petitioners new, properly informed elections under Order No. 260474. Fundamental fairness requires no less.

Respectfully submitted,

Gregory L. Mahaffey*
Jayne Jarnigan Robertson
of
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Attorneys for Petitioners

AFFIDAVIT OF SERVICE AND MAILING

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Jayne Jarnigan Robertson, being first duly sworn deposes and says:

1. That the Petition for Writ of Certiorari to the Oklahoma Court of Appeals, Division III to which this Affidavit is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 29.3 of the Rules of the Supreme Court of the United States by placing three copies of the same in the United States Mail, first class postage prepaid, properly addressed to:

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2. That the foregoing represents service on parties required to be served under the provisions of Rule 29 of this Court.

4. That to my own personal knowledge and pursuant to Rule 29.2 of the Rules of this Court, 40 copies of the Petition for Writ of Certiorari and Appendix were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the 1st day of June, 1993, which is within the time allowed for filing under the Rules of this Court.

Jayne Jarnigan Robertson

Subscribed and sworn to before me this 1st day of June, 1993.

Notary Public

My Commission Expires:
July 1, 1995